

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ANDREW CUDNEY III,

Defendant-Appellant.

---

UNPUBLISHED

July 24, 2008

No. 279165

Hillsdale Circuit Court

LC No. 06-301160

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right the sentence imposed on his jury conviction of receiving or concealing stolen firearms, MCL 750.535b. Defendant was sentenced as a second habitual offender, MCL 769.10, to 23 to 180 months in prison. For the reasons set forth in this opinion, we affirm the sentence of the trial court. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of receiving and concealing stolen firearms, MCL 750.535b and was sentenced as a second habitual offender, MCL 769.10 to 23 to 180 months in prison. The sentencing guidelines for defendant's offense recommended a minimum sentencing range of zero to 11 months. MCL 777.66. Pursuant to MCL 769.34(4), the intermediate sanction rule applies, and the trial court was required to sentence defendant to an intermediate sanction unless the court articulated substantial and compelling reasons for a departure.

A court may depart from the sentencing guidelines if it has substantial and compelling reasons to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the guidelines based on an offense or offender characteristic already considered in determining the guidelines unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). We review a departure from the guidelines to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and his circumstances. *Babcock*, *supra* at 263 n 20, 264.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Id.* at 264-265; *Abramski, supra* at 74. In ascertaining whether the departure was proper, we defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock, supra* at 270.

The trial court found that the guidelines as scored did not give adequate weight to the fact that defendant had ten prior misdemeanors, because only two were scored by the guidelines. Defendant had repeat convictions for four of the same offenses, had been placed on probation three times, and had violated the terms of probation four times. Additionally, defendant had been ordered on four other occasions to pay fines and costs, and had failed to do so until show cause hearings or bench warrants were issued to enforce compliance with the orders. Defendant repeatedly failed to obey court orders and follow authority, as evidenced by his repeated failure to register as a sex offender. Defendant admitted to abusing both alcohol and marijuana since he was 17 years old, failed to complete outpatient treatment twice, tested positive for marijuana twice while on probation, and had four alcohol-related convictions. The trial court stated that defendant was "in need of long-term discipline, reformation, deterrence and rehabilitation", and that "probation and local incarceration has failed." At the hearing on defendant's motion for resentencing, the trial court stated that defendant "has no intention of obeying the law, period."

Defendant argues that the trial court improperly based his sentence on facts that were not proven beyond a reasonable doubt. However, our Supreme Court has held that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), does not apply to a trial court's factual determinations underlying a decision to depart from the Michigan sentencing guidelines. *People v Uphaus*, 480 Mich 939; 741 NW2d 21 (2007), citing *People v Harper*, 479 Mich 599; 739 NW2d 523 (2007).

Defendant also argues that the factors cited by the trial court did not constitute substantial and compelling reasons to warrant a departure. He contends that, because only certain of his prior misdemeanors could be scored under Prior Record Variable (PRV) 5, see MCL 777.53(2)(a) and (b), the Legislature intended that the remaining convictions could not be used as a reason for sentence departure. Defendant provides no authority for this position. We agree with the trial court that these convictions were clearly not accounted for in the guidelines.

Defendant next argues that his substance abuse problems were already accounted for in the guideline scoring, because one conviction scored in PRV 5 was for marijuana possession. However, this PRV does not adequately account for the entirety of defendant's substance abuse history and his repeated failure to address his problem. Defendant also argues that, due to his previous failure to obtain treatment for his addictions, treatment through an intermediate sanction would be more beneficial than a prison sentence. As outlined in the PSIR, though, defendant's history demonstrates that repeated terms of probation and other alternative sentencing have had no positive effect on defendant's behavior, and did not serve to curb his drug use. We disagree with defendant's claim that the trial court "subjectively" found that he refuses to address his problem. Rather, the trial court's pronouncement was based on information in the PSIR.

Defendant also argues that the trial court should not have considered his alleged repeated failure to register as a sex offender when he did not plead to this offense, but to lesser charges of failing to comply with reporting duties. Defendant has not shown that the trial court clearly erred in its determination concerning this issue, as the PSIR states that defendant failed to register as a sex offender.

Defendant challenges the technical characterization of his repeated decisions to ignore various court orders involving fines and costs until apparently forced to do so through the issuance of bench warrants, but his actions clearly show a consistent pattern of contempt for court orders, the criminal justice system and efforts to keep him free from incarceration.

The essence of defendant's arguments is that, because he has "served his time" for his many past transgressions, the trial court was not allowed to take these into account when deciding whether to exceed the guidelines. Defendant is clearly mistaken. A trial court is permitted to take into account defendant's criminal history when imposing a sentence. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000).

Defendant's criminal history, substance abuse history, and demonstrated contempt of past trial court orders provide substantial and compelling reasons that warrant departure from the guidelines. Accordingly, we affirm the sentence of the trial court.

Affirmed.

/s/ Henry William Saad  
/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello